PP

v.

OTTAVIO QUATTROCCHI

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL REVISION NO: 43-11-2002]
13 DECEMBER 2002

CRIMINAL PROCEDURE: *Extradition - Absence of charge - Prosecution failed to serve charges - Whether arrested party must be informed of charges in extradition hearings - Whether such deprivation a breach of rules of natural justice - Whether absence of provisions in Extradition Act allowed non-disclosure of charges - Whether unreasonable to expect arrested party to identify charges based on requisition documents - Whether absence of charges fatal to prosecution's case*

CONSTITUTIONAL LAW: *Court - Sessions Court - Extradition - Power to order discharge at commencement of hearing - Absence of charge - Prosecution failed to serve charges - Whether court seized with jurisdiction to hear matter - Extradition Act 1992, s. 18 - Whether trial judge correct in ordering discharge - Whether absence of charges fatal to prosecution's case*

The respondent, an Italian national who was resident in India during the relevant period, was accused by the Government of India for committing offences under s. 120B of the Indian Penal Code 1860 and s. 5(2) of their Prevention of Corruption Act 1947 ('the alleged offences'). The Indian Government sought for his extradition and the Minister of Home Affairs, Malaysia issued a special direction under the Extradition Act 1992 ('the EA') to such effect.

The respondent was eventually arrested and brought before the Sessions Court judge where the determination that ought to be had was whether the alleged offences were extradition offences *vide* s. 6 of the EA. When the trial commenced, the respondent raised a preliminary objection regarding the further conduct of the inquiry on the premise that he had not been served with any charges thus far. The trial judge upheld the said objection and discharged the respondent, stating that in absence of a proper charge, the respondent would be deprived of forming a proper defence and so would the court be equally deprived as it would be unable to decide on the admissibility of evidence adduced.

The prosecution applied to this court for a review of the said decision. It was contended that the trial judge was not authorised under the EA to make an order to discharge before the trial concluded. It was also argued that the respondent had not been prejudiced due to the absence of proper charge as he had been served with the requisition documents so as to acknowledge the particulars of the offences alleged. Furthermore, the EA did not necessitate the formulation of a charge.

Held:

[1] Under s. 18 of the EA, the Sessions Court is conferred with jurisdiction to inquire into an extradition matter, i.e. that which relates to a fugitive criminal as defined by s. 5 of the EA, brought before it. The objection entertained by the trial judge was accordingly regular. An order for discharge may be made at any stage of the proceedings where the charge was found to be groundless. It is trite that a court could hear matters only if it has the jurisdiction to do so, for otherwise the trial would be a nullity. (pp 564 f-g & 565 c-g)

[2] Any order or decision in matters involving civil consequences, including civil liberties, has to be consistent with the rules of natural justice, unless the statute specifically rules out the application of natural justice. (p 571 a-b)

[2a] One of the fundamental principles of natural justice is that a party in a legal proceeding must have a reasonable opportunity of being heard. A person against whom an order to his prejudice may be passed must have a reasonable opportunity to present his case and this involves the disclosure of the charge which must be in a reasonable time to allow him to prepare his defence. The failure to provide a charge would be equivalent to a denial of the opportunity to be heard. (p 570 e-h)

[2b] An order of extradition to be made against a person is without doubt a matter of personal liberty. Thus, the absence of any provision in the EA relating to a charge does not mean that there is no right to it. On the contrary, such absence confirms the right. (p 571 f)

[2c] In an extradition hearing, the arrested person must be informed of the charges. The charge would articulate the particulars of the offence and the relevant law infringed in a legal form. It is the recognised form of furnishing particulars of an offence in a criminal proceeding. As the inquiry would proceed as if the offences had been committed in Malaysia, the charge must correspond to offences under Malaysian law. In the present case, the prosecution should have served the charges in the Malaysian context and further supplement with particulars of the offence in law. This, however, was not done. (pp 571 g-i & 572 g-i)

[3] A charge is a formal accusation of a crime. Where there is no stipulation that a charge ought to be formulated in a certain manner, then there can be no objection to it being presented in an informal manner provided it contained the necessary particulars. (p 573 a-d)

[3a] The prosecution did not furnish the respondent with a summary of the requisition of documents which was voluminous in nature. It was unreasonable and indeed prejudicial to the respondent to expect him to identify the required particulars in such an instance. (p 573 f)

[4] The court must be furnished with a copy of the charge as this would enable it to decide on the relevancy and admissibility of the evidence submitted, and whether the evidence adduced is sufficient. It would also ensure the identification of the relevant corresponding Malaysian law so as to facilitate a determination of compliance with the double criminality rule. Equally essential is the furnishing of the charge in accordance with the law of the requesting country and if this could not be done, then at least a statement of the particulars of the offence must be supplied. (p 572 b-c)

[4a] Without the charges, or, in the alternative, proper particulars of the offences the inquiry before the Sessions Court just could not have started. In the circumstances, the prosecution's failure to supply the court and the respondent with the corresponding charges was fatal. (p 577 a-b)

[Order for discharge upheld. Prosecution's application for review denied.]

Case(s) referred to:

Ata Muhammad v. Shankar Das AIR [1924] Lah 279 ***(refd)***
Baldev Singh v. State of Himachal Pradesh [1987] 2 SCC 510 ***(refd)***
Carbines v. Pittock [1908] VLK 292 ***(refd)***
Charron v. Government of the United States of America & Anor [2000] 1 WLR 1793 ***(refd)***
Che Ani Itam v. PP [1984] 1 CLJ 72; [1984] 1 CLJ (Rep) 84 ***(refd)***
Cheng Keng Hoong v. Government of the Federation of Malaya [1967] 2 MLJ 1 ***(refd)***
Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 ***(refd)***
Commissioner of Police v. Tanos [1958] 98 CLR 383 ***(refd)***
DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd [2002] 2 CLJ 57 ***(refd)***
German Federal Republic v. Sotoriadis [1974] 2 AC 1 ***(refd)***
Government of Canada & Anor v. Aronson [1989] 2 All ER 1025 ***(refd)***
In re Ismail [1968] 3 WLR 495 ***(foll)***
Mohinder Singh Gill v. The Chief Election Commissioner AIR [1978] SC 851 ***(refd)***
Munnich v. Godstone Rural District Council [1966] 1 WLR 427 ***(refd)***
Norman and Moran v. National Dock Labour Board [1957] 1 Lloyd's Rep 455 ***(refd)***

Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
Ozie Powell v. State of Alabama 287 US 45 ***(refd)***
Pepper v. Hart [1993] 1 All ER 42 ***(refd)***
PP v. Karnal Singh [1971] 1 MLJ 49 ***(refd)***
Prithipal Singh v. Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, Intervener) [1993] 4 CLJ 107 ***(refd)***
R v. Bow Street Metropolitan Magistrate & Ors, ex p Pinochet Ugarte (No 3) [1999] 2 WLR 827 ***(refd)***
R v. Governor of Pentonville Prison, ex p Osman [1990] 1 WLR 277 ***(refd)***
R v. Liverpool Corporation, ex p Liverpool Taxi Fleet Operators' Association [1972] 2 QB 299 ***(refd)***
Re Naghdi [1900] 1 WLR 317 ***(refd)***
Ridge v. Baldwin [1964] AC 40 ***(refd)***
Russell v. Duke [1949] 1 All ER 109 ***(refd)***
Santosh Kumar Sundarasca v. Orissa State Civil Supplies Corporation [1992] Cr LJ 2230 ***(refd)***
State of Orissa v. Dr (Miss) Binapani Dei AIR [1067] SC 1269 ***(refd)***
Triambak Pati Tripathi v. BHS & I Education, Allahabad AIR [1973] All 1 ***(refd)***
Union of India v. Tulsiram Patel [1985] SC 1416 ***(refd)***

Legislation referred to:

Anti Corruption Act 1997, s. 11(a)
Criminal Procedure Code, ss. 141(iii), 379
Emergency (Essential Powers) Ordinance No 22 of 1970, s. 2(1)
Extradition Act 1992, ss. 2, 3, 5, 6(1), (2)(b), 18, 19, 37(1), 41(1), 44
Federal Constitution, art. 5(1)
Interpretation Acts 1948 and 1967, s. 17A
Penal Code, ss. 40, (1), (2), (3), 20B(1), (2) 165, 420

Criminal Procedure Code [India], ss. 173, 190, 204, 240
Penal Code 1860 [India], ss. 120B, 40, 420
Prevention of Corruption Act 1947 [India], s. 5(1)(d), (2)

Other source(s) referred to:

Geoffrey Flick, *Natural Justice,* 2nd edn, p 55
Jones, *Extradition And Mutual Assistance,* 2nd edn
Oppenheim, *International Law,* 8th edn, vol I, p 701
Penyata Rasmi Parlimen Jilid 1 Bil 75 Hari Rabu 30hb Oktober 1991, p 74
Sarkar, *Criminal Procedure,* 7th edn, p 660
TG Choudhury, *Penumbra of Natural Justice,* 2nd edn, p 136

For the applicant - Kamarul Hisham Kamaruddin DPP
For the respondent - Dato' Muhammad Shafee Abdullah (Rabinder Singh); M/s Shafee & Co
Amicus curiae - Dato' Dr Cyrus V Das (Steven Thiruneelakandan); M/s Shook Lin & Bok

Reported by M Maheswaran

JUDGMENT

Augustine Paul J:

At the request of the Government of India the Minister of Home Affairs, Malaysia issued a special direction under the Extradition Act 1992 ("the Act") for the extradition of one Ottavio Quattrocchi ("the respondent") who was accused of committing the following offences in India:

> Criminal conspiracy (Section 120-B); read with section 420 (cheating and dishonestly inducing delivery of property) of Indian Penal Code 1860 and Section 5(2) read with 5(1)(d) (criminal misconduct) of the Prevention of Corruption Act 1947.

The respondent is an Italian national and was resident in India at all material times. He was duly arrested and produced before the Sessions Court to inquire into the extradition matter on 20 December 2000. At the commencement of the inquiry learned counsel for the respondent raised a preliminary objection to the further conduct of the inquiry on the ground that no charges had been served on the respondent. The prosecution contended that the absence of charges was not fatal. At that point of time the proceeding before the Sessions Court was stayed by the High Court following an application made by the respondent. When the High Court dismissed the said application the matter was remitted back to the Sessions Court. The learned Sessions Court judge, in delivering his judgment on the preliminary objection raised, took the view that the court should be in a position at the beginning to determine whether the offences are extradition offences under s. 6 of the Act. As he said in his judgment:

> While on this point I do not agree with the contention of the prosecution that the court postpones the finding of the issue of 'double criminality' until after hearing all the evidence tendered. If this approach is taken the Court may very well end up in embarking on an exercise in futility if after hearing all the evidence the Court discovers that the offences do not fall under the principle of 'double criminality' at the outset. It is my opinion therefore the Court should at the beginning of the proceedings determine whether the offences committed can be regarded as extradition offences under section 6 of the Act.

He further held that without a proper description of the offences the respondent will be prejudiced in conducting his defence. He referred to s. 19 of the Act and said:

> This section gives the subject the opportunity of adducing evidence to show he did not do the acts specified in the offences. Before he can lead such evidence in my opinion he should know the very acts he is supposed to have committed. He can only do this if the offences have been sufficiently particularised.

He also said that without a proper description of the offences it would be impossible for the court to decide whether evidence that is led is admissible or not. He then concluded by saying that it is necessary for a proper description of the offences to have been made available to the court. He added that the tendering of charges would have been preferable. In the circumstances he directed that the respondent be discharged. The prosecution promptly applied to this court for a review of the order made by the Sessions Court pursuant to s. 37 of the Act.

Before I proceed any further it is necessary for me to deal with two applications that were made before me.

Application To Hold A Watching Brief

At the commencement of the hearing before me the learned deputy public prosecutor applied for leave to allow Dato' Dr Cyrus V Das and Mr Steven Thiruneelakandan, both advocates and solicitors, to hold a watching brief for the Government of India. In my opinion the process of an advocate and solicitor holding a watching brief is a form of legal representation for a person. If that person is already represented by counsel to conduct the proceeding it is inappropriate for him to be further represented by another counsel in a different form. Ordinarily the Public Prosecutor cannot be said to represent the complainant in a criminal prosecution. He does not take instructions from the complainant but acts for the state and exercises his own discretion as the guardian of public interest. However, in the case of an extradition inquiry he acts on the instructions of the requesting country to some extent. This is evidenced by s. 37(1) of the Act where, in applying for a review when a fugitive criminal has been discharged, he acts "… at the request of the country seeking the return …". To that extent the Government of India is already represented in the proceedings. Accordingly, I dismissed the application. However, I invited counsel to be present in court to render whatever assistance they could which they did graciously. They were not hindered from participation at any stage of the proceeding. I appreciate and acknowledge the immense contribution made by them.

Authorisation By The Public Prosecutor Under Section 41 Of The Act

When the proceeding had already commenced the learned deputy public prosecutor informed me that the public prosecutor had authorised Dato' Dr Cyrus V Das to appear on his behalf under s. 41(1) of the Act which reads as follows:

> Any barrister, advocate and solicitor or legal officer in the employment of the government of any country may with the written authorisation of the Public Prosecutor appear on his behalf in any proceedings under this Act.

The validity of the authorisation given by the Public Prosecutor is dependent on the interpretation to be accorded to this sub-section. The words "… or legal officer …" are followed by the words "… in the employment of the government of any country …". The question for determination is whether this qualification is confined in its operation to just a "legal officer" or also includes the preceding two categories of persons. The absence of a comma before the words "… or legal officer …" in the sub-section means that the qualification made must be construed conjunctively as applying to all the three categories of persons mentioned. In support I refer to *Prithipal Singh v. Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, Intervener)* [1993] 4 CLJ 107 where Eusoff Chin SCJ (as he then was) said at p. 110:

> We find that Parliament had deliberately inserted a comma after the words 'Federal Territory' and the significance cannot be ignored because without the comma, the words 'Secretary General' and 'public officer' must be read conjunctively, but with the comma, these words must be read disjunctively.

I derive further support for this view from s. 379 of the Criminal Procedure Code which refers to a similar authorisation being given to a local advocate and solicitor. Thus s. 41 of the Act must have been specially enacted for a different purpose as Parliament is presumed to know the existing law. This intention can be gathered from the speech given in Parliament in connection with the Extradition Bill as reported in *Penyata Rasmi Parlimen* Jilid 1 Bil 75 Hari Rabu 30 Oktober 1991 at p. 74:

> Tuan Yang di-Pertua, satu lagi peruntukan baru yang sekarang ini tidak terdapat dalam undang-undang ekstradisi yang sedia ada ialah peruntukan yang dicadangkan dalam Fasal 41 Rang Undang-undang ini. Fasal ini membenarkan seseorang Pegawai undang-undang ataupun peguam dari sebuah negara asing menguruskan sesuatu kes ekstradisi atau membantu Pendakwa Raya di Mahkamah di dalam kes ekstradisi. Peruntukan ini dicadangkan kerana adalah difikirkan bahawa di dalam kes-kes yang kompleks, yang mungkin memakan masa yang panjang untuk diselesaikan, adalah lebih baik jika pegawai undang-undang atau peguam asing yang telah menguruskan kes itu dari mulanya dan lebih arif tentang kerumitannya, membuktikan kes itu di Mahkamah. Walau bagaimanapun, pegawai atau peguam sedemikian hanya boleh berbuat demikian dengan kebenaran bertulis daripada Pendakwa Raya. Bagi maksud-maksud kes yang begini, Fasal 41 ini memperuntukkan bahawa undang-undang berkenaan dengan perihal kemasukan pegawai dan peguam itu serta hak mereka untuk hadir di Mahkamah tidaklah terpakai bagi pegawai undang-undang atau peguam asing itu.

Reference to Parliamentary material as an aid to the construction of legislation as approved in *Pepper v. Hart* [1993] 1 All ER 42 was followed by cases such as *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285 and *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd* [2002] 2 CLJ 57. This purposive approach to the construction of statutes is reflected in s. 17A of the Interpretation Acts 1948 and 1967. The purpose of Parliament is therefore clear. It is also my view that the very fact of employment of an advocate and solicitor for the purpose of appearing in this proceeding will not render him to be a person in the employment of the government of any country for the purpose of the sub-section as its language refers to a person who is already in employment. In the circumstances I hold that the three categories of persons enumerated in the sub-section refer to persons "… in the employment of the government of any country …". Accordingly, I declined to accept the authorisation of the Public Prosecutor. This is an order which I made with considerable regret as Dato' Dr Cyrus V Das is one of the foremost advocates and solicitors in the country and his advocacy skills, preparation of a case and conduct in court in the highest traditions of the Bar are too well-known. Despite my ruling he and his colleague were given full liberty to address the court as *amicus curiae*.

The Right To Raise A Preliminary Objection

In his submission before me the learned deputy public prosecutor contended that the learned Sessions Court judge should not have entertained the objection as an order of discharge can only be made at the conclusion of the inquiry. He said that this procedure is not authorised by the Act unlike in ordinary criminal trials where it is permitted by the Criminal Procedure Code.

A court can hear a matter only if it has jurisdiction to do so. Consent or waiver cannot confer jurisdiction or power on the court to hear and determine an issue or a cause of action which is non-existent (see *Cheng Keng Hoong v. Government of the Federation of Malaya* [1967] 2 MLJ 1). A trial conducted without jurisdiction is a nullity (see *PP v. Karnal Singh* [1971] 1 MLJ 49). It is therefore pointless for the court to proceed with a hearing if at the end it is found to be a nullity for want of jurisdiction. If a jurisdictional objection is apparent at the commencement of the inquiry I do not see any reason why it cannot be raised at that stage as the inquiry cannot proceed further without a resolution of the issue. In this regard I also refer to the procedure governing the conduct of an extradition inquiry. It is said that an extradition inquiry is conducted in like manner as a committal proceeding the procedure for which is governed (now repealed) by the Criminal Procedure Code. Section 44 of the

Act provides for the application of the provisions of the Criminal Procedure Code in relation to matters not covered by the Act. Section 141(iii) of the Criminal Procedure Code (now repealed), a provision dealing with committal proceedings, provides as follows:

> Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if for reasons to be recorded by such Magistrate he considers the charge to be groundless.

An order of discharge may therefore be made at any stage of the proceedings if the charge is found to be groundless. It is therefore my view that an issue as to jurisdiction or any other matter that will render an extradition inquiry groundless can be raised as a preliminary issue. Thus it is appropriate to consider the matters that confer jurisdiction on a Sessions Court to conduct an extradition inquiry in order to ascertain whether the objection that was entertained was regular. This is governed by s. 18 of the Act which reads as follows:

> A Sessions Court shall have the powers and jurisdiction to inquire into an extradition matter brought before it in accordance with the procedure specified under this Act.

The Sessions Court has been conferred with jurisdiction to inquire into an extradition matter which has been brought before it in accordance with the procedure specified under the Act. A Sessions Court may therefore satisfy itself at the commencement of the inquiry that it relates to an extradition matter and that it was brought before it in accordance with the procedure specified under the Act. With regard to the latter there must be compliance with either s. 2 or s. 3 or s. 4 of the Act, as the case may be, and other related matters. Compliance with either one of these provisions will give the Sessions Court jurisdiction to inquire into the extradition matter. An extradition matter is one that relates to a fugitive criminal. Section 5 of the Act defines a "fugitive criminal" as meaning:

> … any person who is accused of or convicted of an extradition offence committed within the jurisdiction of another country and is, or is suspected to be, in some part of Malaysia … .

A "fugitive criminal" is therefore a person who is accused of or convicted of an extradition offence in another country and is in Malaysia. This involves two major elements. They are that:

(i) the fugitive criminal must be a person who has been accused or convicted, and

(ii) it must be in respect of an extradition offence

I shall now consider them.

(a) The Fugitive Criminal Must Have Been Accused Or Convicted

The fact of conviction is comprehensible while the word "accused" requires some deliberation. I interpolate to add that this deliberation is confined to the requirement of the Act only and is not of general application. The clearest indication of a person being an "accused" person is when he is charged in court as it is a formal accusation for a crime. However, such certainty of definition is not free from difficulties in its application to extradition cases. A person may have absconded from a country before being charged and he may be required for that very purpose. The requirement of law may also be such that he can be charged only in his presence. A restriction of the meaning of the word "accused" to a person who has been charged in court will therefore defeat the object of the process of extradition. Its construction must therefore be flexible so as to take into account the laws of other jurisdictions and the circumstances of each case. However, any flexibility of definition must at least refer to a situation where there is clear indication of a prosecution as a person cannot be extradited on mere suspicion or for purposes of interrogation as his return would be for the purpose of a trial. This approach accords with *In Re Ismail* [1968] 3 WLR 495 where it was held that a person is an accused person when the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution. This will require an intense focus on the particular facts of each case. Thus as Lord Steyn said at p. 499:

> It is common ground that mere suspicion that an individual has committed offences is insufficient to place him in the category of 'accused' person. It is also common ground that it is not enough that he is in the traditional phrase 'wanted by the police to help them with their inquiries'.

What therefore requires consideration is the point of time at which it can be said that a prosecution has commenced if it is not confined to the fact of being charged. I shall commence with the position from the point of view of Indian law where a charge is framed by the Court only in the presence of the accused as provided by s. 240 of their Criminal Procedure Code. Prior to this the necessary documents are sent to the magistrate empowered to take cognizance of the offence under s. 173. In the case of a matter initiated by a police report the magistrate may take cognizance of the offence based on the documents submitted to him under s. 190. He will then issue a summons or a warrant of arrest under s. 204. As *Sarkar on Criminal Procedure* 7th edn says at p. 660:

This section relates to commencement of a criminal proceeding.

And further down on the same page:

On issue of process a person complained against becomes an 'accused' (Gulab 38 C880).

Thus in accordance with the principle enunciated in *In re Ismail* [1968] 3 WLR 495 it is only when the magistrate takes cognizance of an offence by the issue of a summons or warrant of arrest can it be said that the prosecution of a person has commenced in order to describe him as an "accused" person. This is logical as the issue of process is a clear indication of a prosecution. Where evidence of such cognizance is not available reliance must be placed on other documents to determine whether a person is an "accused" person. The absence of any evidence will only amount to a suspicion that a person has committed the offence which is insufficient to place him in the category of an "accused" person. In my opinion, therefore, sufficient material must be placed before the court at the commencement of the extradition inquiry to show, *inter alia*, that the fugitive criminal is an "accused" person within the meaning of the Act. If he is not there can be no extradition proceeding against him. It would thus be a folly to go through the process of an extradition inquiry only to realise at the end of it that the person whose extradition is sought is only suspected to have committed an extradition offence and is not an "accused" person.

In order to show that the respondent is a person "accused" of an offence for the purpose of the Act the prosecution referred to a warrant of arrest issued against the respondent by the Special Judge, Delhi. As I said earlier a warrant is sufficient to show that criminal proceedings have been commenced thereby indicating that the person concerned is an "accused" person. The warrant of arrest states that the respondent has been charged with the offence of:

120-B IPC r/w 420 IPC and section 5(2) r/w 5(1)(d) of PC Act 1947 and substantive offences thereof.

The reference in the warrant to the substantive offence against the respondent under the Prevention of Corruption Act 1947 is clearly unsustainable as the said Act, being applicable only to public servants, is inapplicable to the respondent as he is not a public servant. The respondent contended that this renders the warrant defective. In dealing with errors in taking cognizance of an offence Pasayat J said in *Santosh Kumar Sundarasca v. Orissa State Civil Supplies Corporation* [1992] Cr LJ 2230:

At the stage of cognizance, the Magistrate is required to see if a prima facie offence is made out. He is not required to make an elaborate analysis of the materials, and/or to see possibility of conviction or acquittal. The law on the point has been succinctly stated in AIR [1976] SC 1947: (1976 Cr LJ 1933)

Sont Nagawwa v. Veeranna Shivalingappa Konjalji. Further the scope for interference with an order taking cognizance, when the prosecution is at the initial stage, is very limited, and has to be applied rarely with circumspection only when the uncontroverted allegations do not establish the offence.

In my opinion the reference to the substantive offences in the warrant of arrest can be ignored. It has been held that no objection can be taken if a tribunal specifies one or more heads of action and then proceeds only on one head and this is so even if one of the heads not pursued is unjustified (see *Norman and Moran v. National Dock Labour Board* [1957] 1 Lloyd's Rep 455). The defect in the warrant of arrest therefore does not infect the whole of it. Thus what is significant is the reference in the warrant to the two charges in respect of which extradition is sought. They are sufficient to describe the respondent as an "accused" person for the purpose of the Act. I must emphasise that the requirement for a person to be an "accused" person within the meaning of the Act and the need for a charge, which I will consider in a later part of the judgment, are separate and distinct concepts. While a person must be an "accused" person before he can be termed a fugitive criminal the charge becomes relevant only at the stage of the extradition inquiry. As I will explain later the charge is also a matter that goes towards jurisdiction.

(b) The Accusation Or Conviction Must Be In Respect Of An Extradition Offence

Section 5 of the Act defines an "extradition offence" as meaning:

> … an offence described in subsection 6(2) or 6(3) …

Section 6 of the Act reads as follows:

> (1) A fugitive criminal shall only be returned for an extradition offence.
>
> (2) For the purposes of this Act, an extradition offence is an offence, however described, including fiscal offences:
>
> (a) which is punishable, under the laws of a country referred to under paragraph 1(2)(a) or 1(2)(b), with imprisonment for not less than one year or with death; and
>
> (b) which, if committed within the jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death:
>
> Provided that, in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia.

(3) An offence shall also be an extradition offence if it consists of an attempt or a conspiracy to commit, or an abetment of the commission of, any offence described in subsection (2).

The test for criminality is the date of the commission of the alleged offence which is the subject of the extradition request and not the date of receipt of the extradition request (see *R v. Bow Street Metropolitan Magistrate and Others, Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827). Section 6 of the Act makes it clear that in order for an offence to qualify as an "extradition offence" it must not only be an offence punishable under the laws of the requesting country with imprisonment for not less than one year or with death it must, at the same time, be also an offence in Malaysia punishable with imprisonment for not less than one year or with death. This is a reference to the "double criminality rule" as explained in *Government of Canada and Anor v. Aronson* [1989] 2 All ER 1025. As Oppenheim says in his book entitled *International Law,* 8th edn, vol I at p. 701:

> … no person is to be extradited whose deed is not a crime according to the criminal law of the State which is asked to extradite, as well as of the State which demands extradition.

As provided by s. 6(1) of the Act itself a fugitive criminal shall only be returned for an extradition offence. In my opinion, therefore, the prosecution should not undertake an extradition inquiry in respect of an offence committed in another country if it is unable to identify the corresponding local law. It can thus be appreciated with ease the folly of conducting an extradition inquiry only to realise at the end that it is not an extradition offence.

In this case the identification of the corruption offence alleged to have been committed by the respondent in India as stated in the requisition is open to doubt. It is not clear whether it refers to a conspiracy to commit the offence under the Prevention of Corruption Act 1947 or a substantive offence under the said Act. The respondent cannot be liable for the substantive offence as he is not a public servant. The prosecution upon being asked by me to clarify the position confirmed that the requisition refers to:

(a) section 120-B read with s. 420 of the Indian Penal Code, and

(b) section 120-B read with ss. 5(2) and 5(1)(d) of the Prevention of Corruption Act 1947.

The next matter of concern is that there is nothing on record identifying the corresponding Malaysian offences. This is absolutely necessary in order to ensure compliance with s. 6 of the Act. Without an identification of the corresponding Malaysian offences at the commencement of the inquiry it just

cannot proceed as it has to be conducted in accordance with our laws. Upon a query from me the prosecution said that there are corresponding offences in Malaysia in respect of the two Indian offences. The first offence has a corresponding offence in s. 120B(1) read with s. 420 of the Malaysian Penal Code. With regard to the second offence the prosecution submitted that its corresponding Malaysian offence can be found in either s. 165 of the Penal Code or s. 11(a) of the Anti Corruption Act 1997 or s. 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970. I shall hereafter refer to the last two provisions of law as "the corruption charges." I shall consider in the course of the judgment whether the corruption charges constitute offences under Malaysian law so as to satisfy the requirements of s. 6 of the Act.

The Need For A Charge

The critical matter for deliberation is the objection of the respondent that he has not been furnished with the charges so as to enable him to conduct his defence fairly and effectively. It was contended by the prosecution that it is not possible to tender the Indian charges as they can only be framed in the presence of the respondent as provided by s. 240 of the Indian Criminal Procedure Code and that service of the requisition documents on the respondent was sufficient to provide the required particulars. It was further argued that the Act does not require the formulation of a charge. The primary question that requires to be answered is whether there is a right to a charge under the Act even if it does not authorise it. The answer becomes apparent if the purpose of a charge is understood. A person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him (see *Union of India v. Tulsiram Patel* [1985] SC 1416). This is because one of the fundamental principles of natural justice is that a party in a legal proceeding must have a reasonable opportunity of presenting his case (see *Russell v. Duke* [1949] 1 All ER 109). Thus he must be given notice of the case or the charges which he has to meet (see *Triambak Pati Tripathi v. BHS & I Education, Allahabad* AIR [1973] All 1). In *Ozie Powell v. State of Alabama* 287 US 45 it was held that notice is one of the preliminary steps essential to the passing of an enforceable judgment. Disclosure of the charge must therefore be made in reasonable time to allow the person affected to prepare his defence (see *R v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299). Failure to provide a charge will be equivalent to a denial of the opportunity to be heard. As Geoffrey Flick says in his book entitled *Natural Justice* 2nd edn, at p. 55:

> Professor de Smith correctly observed that in a large majority of the reported cases where a breach of the *audi alteram partem* rule had been alleged, no notice whatsoever of the action to be taken had been given to the person claiming to be aggrieved, and that failure to give prior notice had been the equivalent of a denial of the opportunity to be heard: de Smith p 196.

Any order or decision in matters involving civil consequences, which includes civil liberties (see *Mohinder Singh Gill v. The Chief Election Commissioner* AIR [1978] SC 851), has to be made consistently with rules of natural justice (see *State of Orissa v. Dr (Miss) Binapani Dei* AIR [1067] SC 1269). This must be so unless the statute specifically rules out the application of natural justice (see *Baldev Singh v. State of Himachal Pradesh* [1987] 2 SCC 510). As Dixon and Webb JJ said in *Commissioner of Police v. Tanos* [1958] 98 CLR 383 at p. 396:

> But the rule is subject to a sufficient indication of an intention of the legislature to the contrary. Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment.

This view is consistent with art. 5(1) of the Federal Constitution which provides that no person shall be deprived of his life or personal liberty save in accordance with law. The word "law" in art. 5(1) refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution (see *Che Ani bin Itam v. PP* [1984] 1 CLJ 72; [1984] 1 CLJ (Rep) 84, *Ong Ah Chuan v. PP* [1981] 1 MLJ 64). The rules of natural justice have been part of the common law of England for centuries and are therefore guaranteed by the Federal Constitution. This means that the deprivation of a person's life or personal liberty in accordance with the rules of natural justice is a constitutional right unless otherwise provided for by statute. An order of extradition to be made against a person is without doubt a matter of personal liberty and falls squarely within the ambit of this right. Thus the absence of any provision in the Act relating to a charge does not mean that there is no right to it. On the contrary such absence confirms the right. In any event the necessity for a charge can be found in s. 141(iii) of the Criminal Procedure Code, to which I have referred earlier, which recognises the existence of a charge. In *German Federal Republic v. Sotoriadis* [1974] 2 AC 1 Lord Diplock in dealing with the procedure to be followed in an extradition hearing said, *inter alia*, that the arrested person must be informed of the charges (at p. 29). The charge will articulate the particulars of the offence and the relevant law infringed in a legal form. It is the recognised form of furnishing particulars of an offence in a criminal proceeding. As the inquiry will proceed as if the offences had been committed in Malaysia the charge must be in Malaysian law. This will require an identification of the corresponding Malaysian offences. As Lloyd LJ said in *R v. Governor of Pentonville Prison, Ex parte Osman* [1990] 1 WLR 277 at p. 302:

> The practice in extradition cases has been that the English 'offences' are stated in the authority to proceed in very general terms. The magistrate is not, of course, concerned with whether the offence is made out in foreign law. He is concerned solely with whether the evidence would support committal for trial in England, if the conduct complained of had taken place in England: see *In re Nielson* [1984] AC 606. So the magistrate is furnished at the commencement of the hearing with a schedule of charges based on the alleged conduct and formulated in accordance with English law.

Thus the court must also be furnished with a copy of the charge. It is only with a charge will the court be in a position to decide what evidence is relevant and admissible and whether the evidence adduced is sufficient. It will also ensure identification of the relevant corresponding Malaysian law so as to facilitate a determination of compliance with the double criminality rule. It is also essential that a charge in accordance with the law of the requesting country be furnished and if it cannot be done so, for whatever reason, at least a statement of the particulars of the offence must be supplied. With regard to the significance of the time when the charge must be served Jones on *Extradition And Mutual Assistance*, 2nd edn, in referring to *Re Naghdi* [1900] 1 WLR 317 says at p. 335:

> The representative of the requesting State must formulate the charges by the committal hearing and provide the defence with a copy.

It was held in *German Federal Republic v. Sotoriadis* [1974] 2 AC 1 that an extradition hearing cannot start until the magistrate has been informed what the crime is in respect of which the requisition has been made and which will be the subject matter of the hearing. This is for the obvious reason that the failure to do so is a breach of a fundamental rule of natural justice and thereby deprives the court of jurisdiction to proceed. Thus the charge must be furnished to the court and the fugitive criminal at least before the commencement of the inquiry so that it will serve its purpose. It has been held that a judicial decision reached where there is no notice or where there is improper notice in material respects is without jurisdiction and liable to be quashed (see *Ata Muhammad v. Shankar Das* AIR [1924] Lah 279). In *Ridge v. Baldwin* [1964] AC 40 it was held that a decision contrary to natural justice was a nullity, being vitiated by want of jurisdiction. I fail to understand why charges in the Malaysian context were not served, even at this stage, despite the fact that the absence of charges has been a bone of contention between the parties for the last two years. It could have been supplemented with particulars of the offence in Indian law. I do not see any difficulty in complying with this requirement even in the case of a jurisdiction where a charge cannot be framed at the time of the request for extradition. The Malaysian charge is, after all, only for the purpose of conducting the inquiry and not for the purpose of being the foundation for prosecution in the requesting country.

The absence of charges prompted the prosecution to contend that the required particulars can be found in the requisition documents. This raises the question of whether the absence of a charge is fatal. A charge is a formal accusation for a crime. Its fundamental requirements are, as stated in *Penumbra of Natural Justice* by TG Choudhury 2nd edn at p. 136:

> Notice must be fair, adequate and sufficient in order to enable a person charged to prepare his defence. It must bring home to him the nature of the charge, and contain sufficient particulars to enable him to appreciate the case he will have to meet. A mere vague information that important business is to be discussed or that charges are to be brought and an invitation to discuss an incident are insufficient.

Where there is a statutory requirement for a charge to be formulated in a certain manner then it must be presented as required. Where there is no such stipulation there can be no objection to a charge being presented in an informal manner provided that it contains the necessary particulars. Thus in *Charron v. Government of the United States of America and Anor* [2000] 1 WLR 1793 it was held that while the service of a charge is good practice what is essential is that the person whose extradition is requested should know the details of the offences in respect of which the extradition is sought. It has been held that if the notice is contained in separate pieces of paper which, as a whole, convey all that is required it is not deficient (see *Munnich v. Godstone Rural District Council* [1966] 1 WLR 427). It will not serve its purpose if a party is left guessing as to what the charge actually is (see *Carbines v. Pittock* [1908] VLK 292). It would therefore suffice if, instead of a charge, a brief summary of the facts is provided from which the particulars of the offence and the relevant law can be discerned with ease. No such summary was furnished in this case. It is unreasonable to expect the required particulars to be identified from pages and pages of documents that have been supplied in this case. However, in order to address the submission of the prosecution a perusal of the documents tendered is required in order to determine and identify the particulars of the offences. This process may appear to be a consideration of the merits of the case but it is necessary to do so in order to identify the particulars of the offences so as to rule whether they constitute sufficient notice of the charges.

I will first deal with the offence of cheating. The thrust of this offence is the receipt of money by the respondent following the appointment of AE Services Limited of the United Kingdom at his behest as the consultants of Bofors since the appointment of agents was prohibited. However, it must be observed that para. 13 of the "charge sheet" of the Indian authorities refers to the prohibition as:

a the present Government did not approve of the appointment of Indian agent acting for foreign suppliers.

The prohibition is therefore only of the appointment of Indian agents. As AE Services Limited is United Kingdom-based their appointment as consultants to Bofors does not infringe the prohibition. In any event cl. 33.1 of the agreement b entered into between the Government of India and Bofors some two weeks after the imposition of the prohibition has the effect of negating it. It reads as follows:

c All the provisions of this Contract including the Annexures, Enclosures and Clauses shall be harmoniously construed. The Parties have executed this Contract on the basis that the provisions in the Clauses and Annexures both inclusive represent the entire Contract. This Contract sets forth the entire undertaking of the Parties in respect of transactions contemplated hereby and supersedes all prior agreements, arrangements, representations or understanding relating to the subject matter hereof.

d If the prohibition has been superseded by the agreement it ceases to be one. It cannot therefore be the foundation for the offence of cheating. The two issues that I have mentioned, having been addressed by learned counsel for the respondent, did not find their way into the reply by the prosecution. When I invited the prosecution and the two counsel to submit on them there was no e positive response worthy of consideration. These facts cannot therefore be termed or treated as particulars for the offence of cheating in lieu of a charge thereof. In the circumstances it is not possible to discern the particulars for the offence of cheating from the documents made available.

f With regard to the corruption charges and s. 165 of our Penal Code, identified by the prosecution as corresponding Malaysian offences to the Indian corruption charge, there is sufficient evidence on record to show that the respondent received large sums of money from AE Services Limited. That, unfortunately, is the beginning of a major and substantial obstacle. The prosecution has identified three possible provisions of Malaysian law which may correspond to g the Indian corruption charge. The elements for each of the three charges are different. Clearly it is not possible for the respondent to identify with precision the particulars of the offence that he has to answer as he is confronted with three possible offences. That is prejudicial to the respondent. In any event, before attempting to consider their particulars it is perhaps more pertinent to h first determine whether a conspiracy to commit them is an offence under Malaysian law. The offence of conspiracy is governed by our s. 120B of the Penal Code which reads as follows:

i

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment for a term not exceeding six months, or with fine, or with both.

The offences are punishable with imprisonment for a term of more than two years as stipulated in s. 120B(1). Section 120B(2) is irrelevant as it provides for imprisonment for offences for a term not exceeding six months only and will thereby not come within s. 6(2)(b) of the Act. The next matter for consideration is whether the offences are capable of coming within s. 120B. This is governed by the word "offence" in s. 120B(1) which is defined in s. 40 of our Penal Code as follows:

(1) Except in the Chapter and sections mentioned in subsections (2) and (3), the word 'offence' denotes a thing made punishable by this Code.

(2) In Chapter IV and in sections 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 289 and 445, the word 'offence' denotes a thing punishable under this Code or under any other law for the time being in force.

(3) In sections 141, 176, 177, 201, 202, 212, 216 and 441, the word 'offence' has the same meaning when the thing punishable under any other law for the time being in force is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

The general rule as provided by s. 40(1) is that a reference to the word "offence" is a reference to an offence under the Penal Code only. Section 165, being a Penal Code offence, falls within this category and s. 120B(1) can therefore be read with it. It therefore qualifies as an extradition offence within the meaning of s. 6(2)(b) of the Act. The corruption charges are clearly not made punishable under the Penal Code. On the application of the general rule the corruption charges would therefore not fall under s. 120B(1) of the Penal Code. However, there are exceptions to the general rule as provided by sub-ss. (2) and (3) of s. 40 pursuant to which the word "offence" also includes a thing punishable under any other law. If therefore s. 120B(1) of the Penal Code falls within these exceptions then a conspiracy to commit the corruption charges will be an offence under the section. Unfortunately the exceptions provided in sub-ss. (2) and (3) of s. 40 do not include s. 120B of the Penal

Code with the result that the corruption charges cannot be read with s. 120B(1). It follows that a conspiracy to commit the corruption charges are not offences in Malaysia. I pause to add that in India s. 120B has been included in s. 40 of their Penal Code thereby producing a different result. In the circumstances the corruption charges do not qualify as extradition offences as defined under s. 6(2)(b) of the Act. Furthermore, s. 11(a) of the Anti Corruption Act 1997 is inapplicable as it did not exist at the time of the commission of the Indian corruption offence. I will now consider the particulars of the Malaysian offence of conspiracy to commit an offence under s. 165 as it has qualified as an extradition offence. Under s. 165 of the Penal Code the elements that require proof are:

(a) that the accused was a public servant at the time of the commission of the offence,

(b) that he accepted or obtained or agreed to accept or attempted to obtain for himself or for someone else, a valuable thing,

(c) which he obtained from the person described in (b), and

(d) that he gave no consideration for it, or that the consideration given was known by him to be inadequate.

The elements that I have enumerated contemplate the existence of an identifiable public servant who has obtained or agreed to obtain a valuable thing. The documents do not reveal the existence of any such person. Thus it is not possible to formulate the particulars of this offence. In the case of the corruption charges even if a conspiracy to commit them is indeed an offence under Malaysian law it is not possible, just as in the case of s. 165 of the Penal Code, to identify a public servant who has obtained or agreed to obtain a benefit. As the particulars of the offences cannot be identified the need for charges assume significance. At the end of its submission the prosecution invited the court to make an order, as an alternative solution, for the prosecution to frame and serve the charges and thereby re-open the inquiry. I cannot comply with this request for two reasons. Firstly, I cannot make an order for charges to be framed when I know that it cannot be done in light of the reasons that I have discussed earlier. Secondly, I do not see any reason why I should accede to a request to order a party to do something when that party is unwilling to do it itself. If, on the other hand, the prosecution itself had tendered the charges I would have seriously considered remitting the case back to the Sessions Court for hearing, subject to submissions by the respondent. But that was not done. The problems encountered in this case could have been avoided if charges had been framed and served.

Without the charges or, in the alternative, proper particulars of the offences the inquiry before the Sessions Court just could not have started. In the upshot it is my view that failure to supply the court and the respondent with the charges is fatal. The ruling made by the learned Sessions Court judge on the preliminary objection raised by the respondent is therefore correct in law. Accordingly, I confirm the order of discharge made by him and dismiss this application. I must place on record my deep appreciation to counsel for both parties for their extensive research on the issues involved with an eloquent presentation of the fruits of their labour with graceful charm.